**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**

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| **BS&B Safety Systems, LLC,** | ) | |
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| **Respondent,** | ) | |
| | ) | |
| **and** | ) | |
| | ) | **Case No. 14-CA-239530** |
| **United Steel, Paper and Forestry,** | ) | |
| **Rubber, Manufacturing, Energy** | ) | |
| **Allied Industrial and Service** | ) | |
| **Workers International Union,** | ) | |
| **AFL-CIO/CLC** | ) | |
| | ) | |
| **Charging Party.** | ) | |

**RESPONDENT'S REPLY IN SUPPORT OF ITS EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Respondent, BS&B Safety Systems, LLC ("BS&B"), respectfully submits this Reply in Support of its Exceptions to the Administrative Law Judge's Decision and its Brief in Support.

## I. BS&B's Exceptions and Brief in Support Conform to the Board's Rules and Regulations.

In its Exceptions, BS&B clearly identified the questions of procedure, fact, law, or policy of the Administrative Law Judge ("ALJ")'s decision with which it took exception, identified the page and line of the decision to which exception was taken, and directed the Board to the portion of BS&B's Brief in Support for arguments and legal authority setting forth the basis for its exceptions. *See* Rule 102.46(a)(1) of the Rules and Regulations of the National Labor Relations ("Rules and Regulations"). Pursuant to the Board's regulations, BS&B did not include any legal authority or argument in its Exceptions. *See id.*

In its Brief in Support, BS&B restated its exceptions, identified the page and line of the ALJ's decision containing the excepted to portion of the decision, stated all facts from the case

material to the exceptions along with specific cites to the trial record, explained and presented its argument, and cited to relevant law and specific citations to the record. Thus, BS&B's Brief in Support substantially complied with § 102.46(a)(2) of the Rules and regulations.

Not only did BS&B comply with the Board's Rules and Regulations but, more importantly, BS&B's filings fulfilled the purpose of Exceptions and Brief in Support, which is to identify the specific portions of the ALJ's decision to which the party takes exception and to state the reasons the Board should overturn the decision. *See* Rules and Regulations § 102.46; *Valentine Painting and Wallcovering, Inc. & Ronald Caputo*, 331 NLRB 883, 883 n.2 (2000) (disregarding exceptions because they did not identify the portion of the decision excepted to or the reason the Board should overturn the ALJ's decision). It cannot be genuinely argued that it is unclear as to the portions of the ALJ's decision to which exception is being taken, the grounds for the exception, or the law and citations that support the exception. Clearly, the General Counsel understood the exceptions well enough to file a thirty-two (32) page response brief.

At most, the General Counsel's allegation is that, in its opinion, BS&B's filings were technically deficient. Assuming for the sake of argument this were true, the Board should not ignore the merits of a case based on technical violations of the Rules and Regulations. *See James Troutman & Associates*, 299 NLRB 120 (1990).

## II. The General Counsel Has Not Demonstrated the ALJ's Decision to Discredit Dr. Charles Hart's Testimony Was Cogent.

As demonstrated in BS&B's Brief in Support, a judge must base credibility findings on "cogent reasons bearing a legitimate nexus to the finding." *Giday v. Gonzalez*, 434 F.3d 543, 553 (7th Cir. 2006). "'[C]ogent' means 'clear, logical and convincing.'" *Tian v. Barr*, 932 F.3d 664, 668 (8th Cir. 2019). The judge must build a "logical bridge from evidence to conclusion. . . ." *Cojocari*, 863 F.3d at 626 (citing *Brown v. Colvin*, 845 F.3d 247, 251 (7th Cir. 2016)). She "cannot

rely on trivial details or easily explained discrepancies." *Tian*, 932 F.3d at 668 (quoting *Tandia v. Gonzalez*, 487 F.3d 1048, 1052 (7th Cir. 2007)).

In its Response, the General Counsel attempts to support the ALJ's errant decision to discredit almost the entire testimony of Dr. Charles Hart ("Dr. Hart"), BS&B's Director of Human Resources and EHS-NAFTA. *See* Resp., p. 27. The General Counsel has failed to demonstrate the ALJ presented "cogent reasons bearing a legitimate nexus to the finding" that Dr. Hart was not a credible witness. *Giday v. Gonzalez*, 434 F.3d 543, 553 (7th Cir. 2006).

First, the General Counsel confusingly alleges Dr. Hart's testimony was inconsistent because he told Danny Hamra ("Hamra") his written report regarding Stroup's error "could become part of a court record" even though Dr. Hart himself did not take notes at meetings where Stroup's error was discussed. *See* Resp., p. 27. This is illogical. Dr. Hart's advice to Hamra on how to write a report in no way obligated Dr. Hart to take notes at every meeting in which he participated. It certainly does not impeach his credibility. Moreover, thirteen of the trial exhibits in this case contain documents or communications prepared by Dr. Hart, so it is not as if he asked Hamra to create writings but refused to do so himself. (GC Exs. 3, 4, 5, 16, 17, 18, 19, 29; Respondent's Exhibits 2-6.)

Second, the General Counsel alleges Dr. Hart's testimony was inconsistent because he stated he does not normally review discipline issued to employees but also stated he coordinated the investigation into Stroup's error and prepared the discharge letter. *See* Resp., p. 27. The General Counsel ignores that the record demonstrates Dr. Hart does participate in discipline if the conduct at issue is severe. For example, BS&B discharged Sharon Devine, Jonnie Thompson, Jonathan Booth, Michael Horton, and Danny Caffey, for severe workplace issues. (Tr. 413:9-420:14; Respondent's Exs. 2-6.) Dr. Hart issued the discipline to each of these employees. (Tr.

413:9-420:14; Respondent's Exs. 2-6.) If anything, Dr. Hart's involvement in disciplining Stroup lends credibility to the fact that BS&B considered Stroup's error to be severe.

Third, the General Counsel alleges Dr. Hart edited Hamra's written report. *See* Resp., p. 27. As demonstrated in BS&B's Brief in Support, this allegation is based on a blatant misrepresentation of the record. Fourth, the record does not support the General Counsel's allegation that Dr. Hart tried to avoid admitting the conduct of certain persons discharged by BS&B was intentional. The testimony cited by the General Counsel for this proposition only demonstrates the General Counsel asked a confusing question and Dr. Hart sought clarification. (Tr. 428:4-24.) It cannot be seriously suggested that a witness seeking clarification of a question before answering is making an attempt to avoid the question.

Tellingly, as recorded in the General Counsel's Exhibit 17 introduced at trial, Stroup made the following comments demonstrating Dr. Hart's utmost integrity and credibility:

> "I appreciate you (Hart) taking the time to meet with me and listen and discuss issues that are of concern to the union. . . . It has been three years, Dr. Hart that you and I have been working on industrial relations together. Before that you worked with Matt McAfee and Tom Myers in a positive way. I have found you to be a man of integrity, honest in your dealings with employees and have shown that you look out for the safety and welfare of all employees. You are willing to listen and discuss issues."

Finally, the General Counsel ignores the unfairly prejudicial impact the ALJ's decision to discredit Dr. Hart's testimony had on BS&B. Dr. Hart made the final decision to discharge Stroup and was the BS&B representative who articulated the reason for the decision: because of the magnitude of Stroup's production error. (Tr. 324:18-21; 423:23-424:3; GC Ex. 16.) By essentially throwing out all of Dr. Hart's testimony, the ALJ was able to completely disregard BS&B's legitimate, nondiscriminatory reason for the termination decision at issue in this case.

## III. The General Counsel's Response, Like the ALJ's Decision, Misses the Forest for the Trees.

The determinative issue in an unfair labor practice claim is whether the employer discharged an employee "for having engaged in protected activities *when there is no legitimate reason for the discharge*, or the reasons offered are only pretexts." *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1550 (10th Cir. 1996 (citing *NLRB v. Transportation Mgmt. Corp.*, 462 U.S. 393, 398, 103 S.Ct. 2469, 2472, 76 L.Ed.2d 667 (1983)). Issues unrelated to the reason the employer made the decision are ultimately irrelevant to the inquiry. *See id.* (holding that allegations of the employer having an anti-union animus are irrelevant if that animus did not contribute to the employment decision at issue).

The relevant facts of the present case are simple: Michael Stroup ("Stroup") committed an historically severe production error, and BS&B terminated his employment solely because of that error. (Tr. 67:17-20; 104:4-16; 221:23-222:8; 229:7-9; 236:17-20; 247:9-12; 263:19-20; 281:18-21; 318:11-16; 323:17-324:21; 336:24-337:1; 339:7-341:14; 368:2-4; 370:9-12; 375:18-20; 379:10-18; 396:24-398:13; 401:23-402:4; GC's Ex. 16.) End of story. In its Response, the General Counsel raises myriad irrelevant issues in a thinly-veiled attempt to distract the Board from the simplicity of this case. The General Counsel engaged in the same strategy at trial and, unfortunately, succeeded in diverting the ALJ's focus to these irrelevant issues. The Board should decline to fall into the same trap.

For instance, the General Counsel makes much ado about its allegation that Dr. Hart instructed Danny Hamra ("Hamra") to remove from a report speculation that Stroup's error was unintentional. *See* Resp., p. 15. As demonstrated in BS&B's Brief in Support, that is not an accurate portrayal of Dr. Hart's communication to Hamra. Nonetheless, the allegation is irrelevant. The theory that Dr. Hart told Hamra to remove a reference to intentionality in order to

create a pretext for discharge would only hold water if BS&B's stated reason for terminating Stroup's employment was because the error was intentional. BS&B has never argued it terminated Stroup's employment because his error was intentional. It terminated his employment because he made a mistake that rose to the level of gross incompetence. (Tr. 67:17-20; 104:4-16; 221:23-222:8; 229:7-9; 236:17-20; 247:9-12; 263:19-20; 281:18-21; 318:11-16; 323:17-324:21; 336:24-337:1; 339:7-341:14; 368:2-4; 370:9-12; 375:18-20; 379:10-18; 396:24-398:13; 401:23-402:4; GC's Ex. 16.) Thus, the General Counsel's unproven conspiracy theory is nonsensical and, more importantly, irrelevant.

The General Counsel and the ALJ erroneously focused on the allegation that Stroup's error was justifiable because he was relatively new to the Custom Engineering Products ("CEP") department, he had no formal training, and there were numerous steps in building the parts at issue. *See* Resp., pp. 9-10, 22. This focus is misguided. Stroup did not mistakenly skip a nuanced production step in a complicated manufacturing process. Rather, he failed to insert rupture disks *in 77 of the parts he manufactured.* (Tr. 153:20-23; 155:11-13; 281:22-25; 308:20-309:1; 332:12-15; 356:22-25; 368:15-369:22.) BS&B's business is rupture disks. (Tr. 11:7-12:13; 340:12-18; 376:15-377:7; 403:7-17; GC Ex. 11, p. 3.) An employee on his first day in CEP should know the indispensable product in each part he manufactures is the rupture disk.

Stroup had been working in CEP for months (and had worked in CEP years earlier) before making his error. *See* Resp. Br. at pp. 9 (admitting Stroup had worked in CEP for two to three months and had worked there in prior years). It is undisputed Stroup knew every part he made had to contain a rupture disk. The General Counsel's argument, which the ALJ adopted, is akin to an employee working at a soda bottling company sending out empty bottles and then saying "I'm new here, how was I supposed to know soda was supposed to go in the bottles of soda I am making?"

Stroup's relative newness to CEP did not justify or mitigate the severity of his error, does not demonstrate pretext, and is irrelevant to the issue of BS&B's motive.

Another irrelevant theme of the General Counsel's Response, and the ALJ's decision, is the reworkability of the parts made in error by Stroup. *See* Resp. Br., pp. 10-12, 22-23. The General Counsel attempts to conjure up the appearance of pretext by alleging the parts were reworkable and that BS&B changed the IRR and quarantined the parts to make it seem as if they were not. As an initial matter, BS&B never changed the IRR disposition to quarantine the parts because they could not be reworked. It changed the disposition to avoid further delay shipment of the order and because it believed it needed to preserve the parts as evidence of the worst production error in the company's history. (Tr. 276:21-278:2; 286:22-287:3;289:12-22; 316:19-317:14; 318:9-16; 336:5-337:9; 357:20-25; GC Ex. 27, p.5.)

The General Counsel and ALJ's focus on the reworkability of the parts is a red herring. Whether the parts could be reworked was not a factor in BS&B's termination decision. The important factor was that an employee was so incompetent he made 77 parts without inserting BS&B's main product therein. Similarly, the General Counsel's belief that Quality Control would have caught this error because it tested 100% of the parts in that order is irrelevant. If an employee displays such a level of incompetence on one order, he is likely to do so on other orders. Moreover, BS&B has had issues with its quality control employees, so it was not guaranteed that every part would be adequately tested. (Tr. 414:13-415:24; 417:6-419:7 Respondent's Exs. 2, 3 and 5.) Also, it's Stroup's (and every employee's) job to manufacture products properly. He should not need a policy to tell him that if he fails to do it properly he might be replaced, nor should he be allowed to perform at a subpar level in the hopes that someone further down the line will catch his mistakes.

The General Counsel and ALJ's focus on these irrelevant issues (and others) is significant. By alleging BS&B *should have* ignored Stroup's error for various reasons the General Counsel and ALJ have improperly substituted their business judgment for that of BS&B, which is impermissible under the law. *See Jaramillo v. Colorado Judicial Department*, 427 F.3d 1303, 1308-09 (10th Cir. 2005) ("courts may not 'act as a super personnel department that second guesses employers' business judgments.'") (quoting *Simms v. Oklahoma ex rel. Dept. of Mental Health and Substance Abuse Servs.*, 165 F.3d 1321, 1328 (10th Cir. 1999)); *Camarda v. Certified Financial Planner Board of Standards*, Case 1:13-cv-00871-RJL (D.D.C. July 6, 2015) (citing *Blodgett v. Univ. Club*, 930 A. 2d 210, 227 (D.C. 2007) ("In reviewing a disciplinary action by a private organization, courts do not "second-guess" the organization's interpretation of its own rules or its evaluation of the evidence")).

The General Counsel and ALJ's allegation that *they* did not view the error as severe because it was reworkable, or Stroup was new to CEP, or the error was unintentional is irrelevant. The only relevant issue is how BS&B viewed the error. The record overwhelmingly demonstrates BS&B correctly and objectively viewed the error as the most severe in company history and terminated Stroup's employment solely because of his error. (Tr. 19:2-12; 20:14-23; 67:17-20; 104:4-16; 153:20-23; 155:11-13; 181:11-21; 220:16-221:9; 221:23-222:8; 229:7-9; 236:17-20; 247:9-12; 263:19-20; 281:18-25; 308:17-309:1; 318:11-16; 323:17-324:21; 332:2-15; 336:24-337:1; 339:7-341:14; 356:22-25; 368:15-369:22; 370:9-12; 373:22-374:7; 375:18-20; 378:24-379:18; 396:24-398:13; 401:23-402:4; 423:23-424:3; 426:16-17; GC Ex. 16.)

As demonstrated above and in BS&B's Brief in Support, the ALJ's decision was based on numerous allegations irrelevant to BS&B's motivation to terminate Stroup's employment.

## IV. In its Response, the General Counsel Misrepresents the Record Evidence.

Similar to the ALJ, the General Counsel routinely abandoned truth and accuracy as it sought to distort the facts to support its predetermined, inaccurate conclusion that BS&B's termination of Stroup was unlawful. For instance, the General Counsel states BS&B hired Dennis Amend ("Amend") in 2014 for the position of Production Manager, which is wrong. *See* Resp., p. 4. Alan Roberts ("Roberts") is the Production Manager and has held that position since approximately 1980. (Tr. 81:2-3; 308:17-19; 397:2-5; 398:14-16.) Amend is BS&B's Operations Manager. (Tr. 331:17-19.)

While this inaccuracy might seem small at first glance, it is not. First, it is significant that Roberts was the Production Manager, and has held that position for 39 years. Stroup committed a production error. Roberts unequivocally testified that, in his entire time with the company, he has never seen a production error of the same magnitude as Stroup's. Such testimony from the person who has been in charge of production for 39 years is significant. Second, the General Counsel's error demonstrates its inattention to detail. The General Counsel is clearly not concerned with accuracy. Instead, it seems dead set on skirting by the Board's review by relying on misdirection, half-truths, and completely untruthful statements.

Other inaccuracies are significant on their face. For instance, the General Counsel makes it appear as if Tim Jones ("Jones"), Stroup's direct supervisor, was not involved in the investigatory process. However, Roberts interviewed Jones shortly after Stroup's error was discovered. Jones assisted in the investigation by interviewing Stroup and another employee who worked on the floor with Stroup. (Tr. 335:12-24; 358:4-25.) He then reported back to Roberts. (Tr. 358:4-25.) Jones was involved in the investigatory process. The General Counsel also alleges BS&B deviated from its investigatory process because Jones was not involved in discussions about

Stroup's discipline. *See* Resp., p. 29. General Counsel conveniently ignores Jones testified he has *never* been involved in the disciplinary process. (Tr. 364:5-7.) The General Counsel's allusion to the contrary is blatantly false.

In another misrepresentation, the General Counsel refers to General Counsel Exhibit 15 to maintain the anemic allegation that Stroup's error was due to his being interrupted during the manufacturing process. *See* Resp., p. 23-24. Exhibit 15 is Roberts' notes from his interview of Stroup. Stroup told Roberts generally people came into his area and disrupt his concentration, but he never said his error was caused by any disruption.[1] To the contrary, Stroup expressly testified he had no recollection of being interrupted at the time he made the error. (Tr. 179:24-180:16.) The above are only examples of the many factual inaccuracies and misleading statements in the General Counsel's Response.[2] The Board should disregard any portion of the General Counsel's Response that is inaccurate and unsupported by the record evidence.[3]

## V. Conclusion

For the foregoing reasons, and those stated in BS&B's Exceptions and Brief in Support, BS&B requests the Board overturn the ALJ's decision and dismiss with prejudice the Complaint below in its entirety.

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[1] Stroup also told Roberts that several people had been pulled away from production to work in shipping, but then admitted that had not happened to him. (GC Ex. 15.) At most, Stroup's comment to Roberts is limited to a generic statement that disruptions sometime occur. It is not a statement that the error occurred *because* of a disruption.

[2]The inaccuracy of the record is unfortunately not limited to General Counsel's misrepresentations. The ALJ's Decision misrepresents that a witness "developed a highpitched (sic) giggle," and speculates, beyond any reasonable inference, that the giggle was an expression of the witness becoming nervous between court sessions. *See* ALJ Decision at p. 19, ll. 12-14. BS&B hereby tenders an offer of proof, to be corroborated by testimony before the Board, that the monotone and low-speaking engineer had no such affect. Not knowing that the ALJ would fabricate this characterization, BS&B has had no prior opportunity to refute the ALJ's finding.

[3] BS&B must further object to the ALJ's setting aside Defense Federal Acquisition Regulations and confidentiality restrictions imposed by the Department of Defense. *See* ALJ Decision at pp. 29-30. The ALJ has no authority to do so. BS&B incorporates herein, by reference, it's Petition to Revoke Subpoena Duces Tecum filed with the Board July 3, 2019, BS&B's Privilege Log and Redaction Log, and BS&B's Brief Regarding Continuation of Protection of BS&B's Confidential Information.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on January 28, 2020, the above Reply Brief in Support of the Exceptions to the Decision of the Administrative Law Judge were filed via the Board's e-filing system with:

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I hereby also certify that, on January 28, 2020, copies of the Reply Brief in Support of the Exceptions were served via email on the following:

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